76-1092

IN THE

Supreme Court of the United States

October Term, 1977
No.

JOSEPH FALCONE and JOSEPH CURRERI,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1976

No.

JOSEPH FALCONE and JOSEPH CURRERI,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioners Joseph Falcone and Joseph Curreri, jointly and severally pray that a Writ of Certiorari issue to review the respective orders of the United States Court of Appeals for the Second Circuit affirming the judgments

of the United States District Court, for the District of Vermont, which convicted each Petitioner of Conspiracy to violate the Bankruptcy laws and for fraudulent transfer and concealment of the property of a bankrupt, making a false oath in regard to bankruptcy proceedings, and the making of a false entry in a document relating to the property of a bankrupt. (18 U.S.C. 152 and 2).

OPINION BELOW

The opinion of the Second Circuit is reprinted in the appendix hereto.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1). The Circuit Court affirmed the convictions

of the District Court on November 1, 1976 and a petition for rehearing was denied on December 30, 1976.

QUESTIONS PRESENTED

1. Whether there can ever be a violation of 18 U.S.C. §152 when there has been full disclosure, and no concealment of assets from the Trustee in Bankruptcy?

2. Whether Petitioners could be found guilty of any crime when the evidence at trial revealed that they had relied exclusively on the advice of their attorney and of their Certified Public Accountant?

3. Whether Petitioners were deprived of Due Process by the rulings of the Courts below that the Government

could shift the theory of the Indictment which alleged conspiratorial conduct beginning in December of 1973, while the government rested its case substantially on credits given customers of Falcone Dairy as a result of defective cheese it received from its wholly owned subsidiary, Alburg Creamery, (the bankrupt) in 1971?

A. In essence the Government's theory was that Petitioners began a "conspiracy" in 1971 with reference to an involuntary bankruptcy which occurred two years later as a result of a non-suspicious fire in July 1973 which virtually destroyed Alburg Creamery.

Is it possible to attribute conspiratorial conduct to persons who

could not possibly have anticipated the bankruptcy two years later?

4. Whether Petitioners were deprived of Due Process and a fair trial when the trial court permitted two separate summations--one by an Assistant United States Attorney and another in the guise of rebuttal from the United States Attorney himself, who injected his own credibility into the trial?

5. Whether it was improper to allow Agent Axton to testify about Falcone's conversation with his lawyer?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments and Sections 152 and 2 of Title 18 United States Code are involved herein.

STATEMENT OF THE CASE

The undisputed testimony revealed that Falcone Dairy Company was one of the main cheese customers of its wholly

owned subsidiary, Alburg Creamery of Alburg Vermont.

It is also undisputed that in 1971 there were substantial entries in the books of Falcone Dairy which were not viewed with suspicion by the Government since they were kept in the regular course of business, and that Falcone Dairy gave substantial credits to its cheese customers for defective and "fishy smelling" cheese which it had purchased from Alburg.

No debit was charged against Alburg Creamery at this time since Alburg was a wholly owned subsidiary of Falcone and would have been put out of business by such a debit charge since it would have dried up its cash flow.

In July of 1973 Alburg Creamery

was almost wholly razed by a fire. It was never suggested that Petitioners were in any way involved in setting any fire. On the contrary, the fire had a catastrophic impact on Falcone Dairy which itself became insolvent shortly thereafter since its main source of cheese was destroyed.

In spite of desperate efforts by Falcone Dairy and Petitioner Falcone to work out a rebuilding plan with its creditors and those of Alburg which Falcone owned, some creditors threw Alburg Creamery into involuntary bankruptcy in December of 1973.

Up to this time, Falcone Dairy had never taken any credits for the defective cheese which it had duly noted on its books in 1971 which it had received

from Alburg.

In January 1974, after informing their attorney, Joseph Wool, Esq. of Burlington, Vt. of this situation, the Petitioners were advised that since the books and records of Falcone Dairy duly noted these entries, that it would be proper to take this credit then and there.

Full disclosure was given to the Trustee in Bankruptcy and the entries in the books of Falcone clearly revealed the entries. Falcone did not participate in any distribution or assets,however.

A professor of Accountancy at the University of Vermont as well as a C.P.A. of decades of experience testified that the credit was properly taken and that no fraud or concealment occurred. On the contrary, full disclosure was

obvious at all times. (Professor Gary Michael and Mario Accardi).

Both Petitioners took the stand and corroborated this evidence. Neither had any prior convictions.

Agent Axton of the F.B.I. who was not even a C.P.A. was confused and inaccurate on the stand. It was most apparent that he misunderstood the accounting principles involved.

The Court permitted the Government to dwell on whether in fact there had been defective cheese in 1971 to the extent the books of Falcone disclosed. The cheesemaker, Leo Larames, and his son said that they did not recall any large amounts of cheese being returned in 1971 or any major complaints. Leo Laramee, however, admitted that he

resigned as cheesemaker because he could not maintain sanitary conditions in the cheese making operations.

It was not disputed that the $210,711.05 credit against Alburg by Falcone Dairy was supported by the books of Falcone which had been delivered to the Trustee.

The "credit" could not be "false" as alleged in the opinion of the Circuit Court (slip 347), since it was fully supported by records which were not alleged to be false or "doctored". The bookkeepers for Falcone Dairy testified those records were accurate and were kept in the regular course of business. They and others who testified remembered the foul smelling cheese.

Thus, despite full disclosure of

the entry which is the main issue in this case, the Court at trial allowed this case to go to the jury on the premise of fraudulent concealment.

THE STATUTE INVOLVED

The relevant portions of 18 U.S.C. §152 provide as follows:

> "Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding. any property belonging to the estate of a bankrupt; or
>
> Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; or
>
> ***
>
> Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against him or any other person or corporation,

> or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation; or
>
> Whoever, after the filing of a bankruptcy proceeding or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt;
>
> ***
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

POINT I

THERE WAS INSUFFICIENT EVIDENCE AS A MATTER OF LAW TO HAVE WARRANTED EITHER THE INDICTMENT OR A SUBMISSION OF THIS CASE TO THE JURY. THE COURT SHOULD HAVE DISMISSED THE CASE AT THE CLOSE OF THE PROSECUTION'S CASE UNDER THE PRINCIPLES OF IN RE WINSHIP, 397 U.S. 358, 361-364 AND UNITED STATES

V. TAYLOR, 464 F.2d 240 (2 Cir. 1972).

The entire case herein was predicated upon a credit which Falcone Dairy Company asserted against its wholly-owned subsidiary, Alburg Creamery, the bankrupt, for about $210,000, in 1974. This credit was asserted, predicated upon advice of counsel and also upon the fact that in 1971, Falcone Dairy Company had given credits to its own cheese customers, of substantial amounts, for defective cheese.

Joseph Falcone, one of the defendants-petitioners herein, was Vice-President of Falcone Dairy Company. Joseph Curreri, the other petitioner, was the Office Manager, but held no title in the company.

Bookkeepers, whose honesty and integrity were not disputed, made entries in the regular course of business during 1971 indicating the credits for cheese. These books and records were turned over to the Trustee in Bankruptcy. All books and records of Falcone Dairy were made available to the Trustee in Bankruptcy. Nothing was deliberately or intentionally withheld.

The entry of $210,000 was fully disclosed to the Trustee in Bankruptcy.

An F.B.I. Agent by the name of Albert Axton, who was assigned to the District of Vermont, was obviously the "Godfather" of the prosecution herein. It was by virtue of his analysis of the books and records which were submitted in this case, that the prosecution

determined to submit this matter to a grand jury. Axton testified at the trial as the key witness for the Government. He admitted that he was not a certified public accountant and that his training had been in the accounting field.

We have reproduced the testimony of Mr. Axton and ask this Court to review that in the light of the testimony of Mario Accardi, a certified accountant of almost four decades experience, and that of Professor Gary Michaels, a certified public accountant who was a professor of accountancy at the University of Vermont. (See Appendix in Court below.)

It is pitifully manifest that Agent Axton did not know his accountancy and was obviously wrong in his analysis of the books and records.

Axton admitted that at most he saw a violation of accounting principles in taking a credit in 1974 for defective cheese which Falcone Dairy had received from Alburg Creamery in 1971. (477)*

Axton admitted that he was not claiming that Falcone Dairy's books and records were false. (478)

When confronted with the fact that Mario Accardi, the accountant for Falcone Dairy with some 38 years experience as a certified public accountant, had testified that he believed that the entry was proper, that is the credit for $210,000 in 1974, Axton declared that he disagreed with Mr. Accardi.

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*Numerals in parentheses refer to pages of the official court reporter minutes of trial. Where prefix "A" is used, it refers to appendix filed in 2nd Circuit.

When Professor Michaels testified, he, too, testified that the entries were not improper and that there was no fraud or concealment but, on the contrary, there was full disclosure.

The testimony of Axton with respect to unrealized appreciation of the Alburg Creamery property in connection with a proposed loan that was being negotiated but which was never consummated prior to the bankruptcy, reveals how thread-bare his knowledge of accountancy really was. He could not understand how it was possible that a piece of property which was acquired at an amount of "X dollars" many years ago could now be worth "X plus Y dollars" when a sale was contemplated. He had difficulty understanding the concept of unrealized

appreciation. When asked various questions, it is obvious that Axton was completely "at sea" with respect to accounting principles that for a certified public accountant should have been "duck soup". (479) (A-304)

Alburg Creamery's books had been destroyed in a fire. Falcone Dairy's books were available and the red entries which were taken in 1971 for the defective cheese which was received from Alburg Creamery, were all in Falcone Dairy's books. (471) (A-296) Axton conceded this fact. There was no concealment of these red entries.

There is nothing in the record to indicate that the Trustee in Bankruptcy, or anyone else, challenged these entries. As a matter of fact, since Falcone Dairy

did not participate in the distribution since Alburg was its wholly-owned subsidiary, no creditor was in any way affected by the credit anyway.

Additionally, since Falcone Dairy had long since been insolvent itself, it was a meaningless entry since Falcone Dairy had no money of its own.

The Government permitted the entire trial to degenerate into an argument over whether or not smelly and defective cheese had in fact been delivered from Alburg Creamery to Falcone Dairy in 1971. There was obviously no dispute over the fact that the books and records which were kept in the regular course of business by bookkeepers in 1971 reflected many, many red entries indicating that cheese had been returned

to Falcone Dairy from its customers. It is uncontested that in 1971 these credits were not charged against Alburg Creamery for the obvious reason that Alburg Creamery was a wholly-owned subsidiary of Falcone Dairy and to have charged these credits against Alburg in 1971 would have stopped its cash flow and, in effect, would have put it out of business. Falcone Dairy depended upon Alburg Creamery's porduction for the mainstay of its business.

The two defendants, the bookkeepers, a customer of Falcone Dairy, all testified that there was smelly, horribly odoriferous cheese received from the Alburg Creamery in 1971. Substantial amounts had been returned. J. Leo Laramee, who was the cheesemaker

employed at Alburg Creamery, declared that he did not recall any great quantities of defective cheese being returned to him and did not recall that he had any great problems with cheese in 1971. There were a great deal of discussions over whether or not a well had been dug in 1969 or 1971.

The net effect of all of this testimony was to introduce a great deal of irrelevant material into the case.

The issue in this case was whether a violation of Section 152 of Title 18 of the United States Code occurred, and whether a conspiracy to violate that Section had been perpetrated.

Title 18 United States Code -152 created eight paragraphs. (UNITED STATES v. GORDON, 379 F.2d 788, 2 Cir., cert.

den. 389 U.S. 927 [1967]). See also, UNITED STATES v. ARGE, 418 F.2d 721, 723, 10 Cir. 1969.

Concealment is a continuing offense (SOMBERG v. UNITED STATES, 71 F.2d 637 [7 Cir. 1934]):

> "The concealer can be held but for one offense of concealing during the period of a continuous concealment." (Id. at 639).
>
> "It is sufficient to constitute concealment if it prevents the discovery of or withholds knowledge of the asset." BURCHINAL v. UNITED STATES, 342 F.2d 982, 985 (10 Cir.), cert. den. 382 U.S. 843 (1965).

See also, UNITED STATES v. ARGE, supra.

While we recognize that a finding of guilt must be sustained if it is supported by substantial evidence in the light most favorable to the United States (GLASSER v. UNITED STATES OF

AMERICA, 315 U.S. 60, 1942), there is absolutely no basis upon which the Court could have predicated a submission of this case to the jury. (See UNITED STATES v. TAYLOR, supra).

The prosecution maintained that when the defendants took the advice of their attorney, Joseph Wool, Esq., and had Falcone Dairy take a $210,000 credit for defective cheese which had been received by Falcone Dairy from Alburg Creamery in 1971, that this constituted the crime of concealment of assets.

There is absolutely nothing in the indictment to indicate that it was defective cheese which was the nub of the indictment.

The indictment says, inter alia, that the Falcone Dairy "with intent to

defeat the bankruptcy law, did knowingly and fraudulently transfer and conceal property of Alburg Creamery; namely, accounts receivable to Alburg Creamery owed by Falcone Dairy, in excess of $100,000.00" [Count One].

The credit was fully disclosed to the Trustee in Bankruptcy and was never hidden.

During the trial, for the first time, the Government sought to establish that Alburg Creamery had not shipped such a large quantity of defective cheese to Falcone Dairy. This was not part of the indictment and, as a matter of fact, the indictment charges, in the conspiracy count, that from on or about "December 13, 1973, up to and including the date of this indictment", the defendants

acted in violation of the statute.

There were completely improper insinuations made in the form of questions propounded by the prosecutor tending to suggest that defective cheese had not been received in 1971 in the quantities which the books and records of Falcone Dairy indicated.

We must bear in mind that the books and records of Falcone Dairy were available to the Trustee in Bankruptcy and were never hidden. The entries were made in the regular course of business and showed the substantial credits given by Falcone Dairy to its customers.

The problem, as we have already stated, was that in 1974, following the disastrous fire which destroyed Alburg Creamery, and the involuntary petition

in bankruptcy, on advice of counsel Falcone Dairy took the credit which they were entitled to in 1971.

There was never any proof that defective cheese was not returned to Falcone Dairy. J. Leo Laramee, the cheesemaker, merely testified that he did not recall that there had been any complaints or that any large quantities of defective cheese had been shipped by Alburg Creamery to Falcone Dairy. He did not dispute the fact that the credits were taken or that defective cheese did arrive in customers' hands from Falcone Dairy.

As was stated in UNITED STATES v. NILL, 518 F.2d 793, 800 (5 Cir. 1975),

> "Fraud connotes perjury, falsification, concealment, misrepresentation, Knauer v. United States,

> 328 U.S. 654 . . . 1946. It has been held that to establish fraud it is necessary to show a false representation of a material fact made with knowledge of its falsity with the intent to deceive. Pence v. United States, 316 U.S. 332 . . . 1942."

When Section 152 of Title 18 of the United States Code is viewed, it is obvious that there must be a concealment of assets or a false oath or claim with respect to such concealment. Nothing whatsoever is in the record of the case at bar. Even Mr. Axton, the F.B.I. agent who gave birth to this case, cannot say that there was any failure of disclosure or that any record or book was false. At most, he could opine that he disagreed that the entry of the $210,000 credit in 1974 was proper bookkeeping procedure for 1971 credits which were due to Falcone Dairy from Alburg Creamery.

If there was a dispute about accountancy, the fact that full disclosure was made would preclude any criminal charge. In the case at bar nobody disputes that full disclosure has been made at all times. The suggestion that the cheese itself was not defective and that, therefore, the credits themselves should not have been given to the customers, is without any basis in the record whatsoever. The jury had no right to speculate as to whether or not in fact the Falcone Dairy should or should not have credited their customers with defective cheese in 1971. There is uncontradicted evidence that at the Falcone Dairy plant in 1971 in New York City, large quantities of defective cheese were returned from customers, and that

this cheese had originated in Alburg Creamery. This evidence came not only from the defendants, but from bookkeepers and from a customer who testified. As a matter of fact, the Government was unquestionably aware of this since they interviewed the witnesses who the defense had called and also had interviewed many customers of the defendants.

The testimony of Professor Michaels at pages 567 through 570 revealed that it was his opinion that the entries made by Falcone Dairy were not only proper, but also fully disclosed everything to anybody who looked at the books. We must bear in mind that these books were never hidden from anybody.

The cross-examination of Professor Michaels reveals that the Government was

completely off-base in its prosecution. It asked, as it had asked other witnesses, whether or not professor Michaels knew whether the cheese was in fact bad in 1971. We maintain that is irrelevant to this case. The issue is whether any assets were concealed in contemplation of a bankruptcy.

Whatever happened in 1971, was fully disclosed and was entered in the regular course of business in the books of Falcone Dairies.

As we have said time and again in this brief, nobody in their right mind could even suggest that what was done in 1971 was in contemplation of an involuntary bankruptcy which would occur in December of 1973 as a result of a non-incendiary fire in July of 1973.

The charge herein is a bankruptcy fraud of concealment of assets. There is absolutely no evidence that assets were concealed. In short, the entire case fails to reveal the commission of any crime whatsoever.

POINT II

THE DEFENDANTS-PETITIONERS UPON ADVICE GIVEN TO THEM BY AN ATTORNEY AT LAW HANDLING THE BANKRUPTCY MATTER IN VERMONT, AS WELL AS A CERTIFIED PUBLIC ACCOUNTANT OF SOME FORTY YEARS EXPERIENCE. IT WAS THEREFORE MANIFEST THAT THE DEFENDANTS COULD NOT HAVE HAD CRIMINAL INTENT. IN ANY EVENT, SINCE THERE WAS FULL AND COMPLETE DISCLOSURE TO THE TRUSTEE IN BANKRUPTCY AND ANYONE ELSE WHO WANTED TO VIEW THE BOOKS AND RECORDS, THERE WAS NO CRIME COMMITTED TO WHICH CRIMINAL INTENT COULD ATTACH.

The difficulty in dealing with this brief is that a perusal of the record reveals that these defendants have been put

through the gauntlet of a "prosecution" that does not exist. In other words, the entire prosecution herein is something that was concocted through a mistake of an F.B.I. accountant who, unfortunately, was not that well-versed in accounting procedures.

Even if his inference was sound that a $210,000 credit should not have been taken in 1974 for credits given to Falcone's customers in 1971, the fact remains that the $210,000 credit was fully disclosed to the Trustee in Bankruptcy and was in no way hidden or concealed. The entries in 1971 were made in the regular course of business in the books of Falcone Dairies by regular bookkeepers and nothing was concealed with respect to those entries. There

was nothing conjured up overnight, in other words, to create entries which had not existed before.

But that aside, it is obvious that the defendants acted upon advice of an attorney at law. Joseph Wool, an experienced attorney, testified, as did the defendants, that he informed them that they had a perfect right to take a credit for the amounts of cheese which were returned by customers in 1971, since they had not previously taken credits for that.

Mario Accardi, a certified public accountant who had represented Falcone Dairies for many years, testified that in his opinion the credit was proper even though it was somewhat unusual to wait two years before taking it.

The explanation that they could not take it in 1971 without putting Alburg Creamery out of business, was quite simple and obvious. Alburg Creamery was a wholly-owned subsidiary of Falcone Dairies and the latter depended upon the former to stay in business since without production of cheese it could not service its customers. To have taken the credit at that time, that is 1971, would have been self-defeating since Alburg would no longer have a cash flow and would have been out of business. The entry itself in 1974, as a matter of fact, was for the purpose of showing the true picture and we submit that it might have been concealment <u>not</u> to have taken the $210,000 credit.

We hasten to add, that no creditor

was in any way damaged by the $210,000 credit since it was merely a bookkeeping entry because Falcone Dairies was insolvent as well at that time. Falcone Dairies did not participate in the distribution of assets of Alburg Creamery and consequently the entry was merely to bring the picture into proper focus and not for the purpose of defrauding anyone.

It was, in fact, full disclosure, rather than non-disclosure. It obviously was not concealment.

Advice of counsel, while it may not be a complete defense to criminality, is nevertheless an important element to be considered in determining good faith of any person involved in a bankruptcy who is prosecuted for fraudulently concealing

property from the trustee. In the case at bar there is no question that good faith advice was given by both Mario Accardi and Joseph Wool, Esq. (BISNO v. UNITED STATES, 299 F.2d 711 [C.A. Cal. 1961], cert. den. 370 U.S. 952; reh. den. 371 U.S. 855; HERSH v. UNITED STATES, Cir. Cal. 1934, 68 F.2d 779).

This factor of advice of an attorney and of a certified public accountant, coupled with the regular course of business entries in the books and records of Falcone Dairy should have impelled the District Court to grant the defense motion to dismiss this case.

The petitioners, through their attorney, on a number of occasions, cited UNITED STATES v. TAYLOR, 2 Cir. 1972, 464 F.2d 240, to the District Judge,

but to no avail. It is appropriate to quote the language of the Court of Appeals (id. at 242):

> "It is, of course, a fundamental of the jury trial guaranteed by the Constitution that the jury acts, not at large, but under the supervision of a judge. See Capital Traction Company v. Hof, 174 U.S. 1, 13-14, 19 S. Ct. 580, 43 L.Ed. 873 (1899). Before submitting the case to the jury, the judge must determine whether the proponent has adduced evidence sufficient to warrant a verdict in his favor. Dean Wigmore considered, 9 Evidence §2494 at 299 (3d ed. 1940), the best statement of the test to be that of Mr. Justice Brett in Bridges v. Railway Co. [1894] L.R. 7 H.L. 213, 233:
>
> [A]re there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the Plaintiff is bound to maintain?
>
> It would seem at first blush--and we think also at second--that more 'facts in evidence' are needed for the judge to allow men, and now women, 'of ordinary reason and fairness' to affirm the

> question the proponent 'is bound to maintain' when the proponent is required to establish this not merely by a preponderance of the evidence but, as all agree to be true in a criminal case, beyond a reasonable doubt. Indeed, the latter standard has recently been held to be constitutionally required in criminal cases. In re Winship, 397 U.S. 358, 361-364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). We do not find a satisfying explanation in the Feinberg opinion why the judge should not place this higher burden on the prosecution in criminal proceedings before sending the case to the jury."

A perusal of the TAYLOR case reveals that if there was ever a case where this doctrine should have been applied, this is the one. To have permitted lay jurors to grapple with the plethora of accounting jargon and books and records, was totally unfair.

We submit that what the jury

conjured from this case was not a concealment of assets, but rather a question of vindicating the reputation of J. Leo Laramee, who had admitted that he resigned because he was unable to maintain proper standards as cheesemaker at Alburg Creamery. J. Leo Laramee was a Vermonter, whereas the defendants herein, both of Italian extraction, emanated from Brooklyn, New York.

POINT III

THE DEFENDANTS-PETITIONERS WERE DENIED A FAIR TRIAL BY VIRTUE OF THE FACT THAT F.B.I. AGENTS WERE PERMITTED TO TESTIFY AS TO CONVERSATIONS THEY HAD WITH THE PETITIONERS AT A TIME WHEN THE LATTER WERE NOT INFORMED THAT THERE WAS A CRIMINAL INVESTIGATION AFOOT. ADDITIONALLY, F.B.I. AGENT AXTON, AFTER AGREEING THAT HE WOULD NOT INTERVIEW DEFENDANT FALCONE, CONDUCTED A MEETING WITH FALCONE'S

LAWYER AT WHICH FALCONE WAS PRESENT. THAT LAWYER, JOSEPH WOOL, ESQ., TURNED TO HIS CLIENT FROM TIME TO TIME TO OBTAIN CERTAIN INFORMATION. UNBEKNOWN TO MR. WOOL OR MR. FALCONE, AGENT AXTON DETERMINED THAT HE WOULD USE ANYTHING FALCONE SAID TO HIS OWN LAWYER AGAINST HIM. AT THE TRIAL AXTON WAS PERMITTED TO TESTIFY AS TO STATEMENTS HE HEARD FROM FALCONE DURING THIS INTERVIEW WITH FALCONE'S LAWYER. THIS WAS OUTRAGEOUS AND FUNDAMENTALLY UNFAIR CONDUCT.

During the trial, F.B.I. Agents James Kallstrom, Lawrence Playford, and Albert Axton testified as to conversations they had wherein they quoted statements made by the defendants.

Both Kallstrom and Playford admitted that they had interviewed appellants in New York on occasions when they had not informed the petitioners

that this was a criminal investigation.

The testimony of Kallstrom and Playford was bad enough. We submit that it constituted improper prosecutorial conduct.

What bothers us most, however, is the actions of F.B.I. Agent Axton.

He testified that he arranged a meeting to discuss this bankruptcy matter with the bankruptcy attorney, Joseph Wool, of Burlington, Vermont. Mr. Wool represented the appellant Falcone, as well as Curreri.

At Mr. Axton's office, both Wool and Falcone arrived per schedule. Axton admits that Wool stated that he did not want his client interviewed.

Notwithstanding this fact, when

the meeting commenced, from time to time Falcone had discussions with his own attorney which Axton could hear. Axton did not inform Wool that he would make mental notes of what Falcone was saying and would use these against him if necessary, at a later time.

At the trial, the Government did in fact introduce statements made by Falcone during this meeting, contrary to the understanding of his attorney.

We maintain that this was fundamentally unfair and the prosecutor should not have used it. (MESAROSH v. UNITED STATES, 352 U.S. 1, 9, 14).

In 1 Cooley, Const. Lim. (8th Ed.) 646, Judge Cooley in this monumental work appropriately asserted:

"In this country, where

officers are specially appointed or elected to represent the people in these prosecutions, their position gives them immense power for oppression; and it is to be feared they do not always sufficiently appreciate the responsibility, and wield the power with due regard to the legal rights and privileges of the accused . . . . It is the duty of the prosecuting attorney to treat the accused with judicial fairness; to inflict injury at the expense of justice is no part of the purpose for which he is chosen. Unfortunately however, we sometimes meet with cases in which these officers appear to regard themselves as the counsel for the complaining party rather than impartial representatives of public justice." (Emphasis added.)

Mr. Justice Roberts in SORRELLS v. UNITED STATES, 287 U.S. 435 (1932), in an opinion in which Mr. Justice Brandeis and Mr. Justice Stone concurred, stated (id. at 453):

> "The efforts . . . to obtain arrests and convictions have too often been marked by reprehensible methods..."

Justice Roberts continued by referring to these methods as a "prostitution of the criminal law" (id. 287 U.S. at 457).

We must bear in mind that the conference with Mr. Wook was supposedly in a friendly, professional vein, and there was no idea whatsoever in the mind of Mr. Wool that Mr. Axton was acting as a "Trojan horse".

During the testimony (465-475), Axton admitted that Mr. Wool informed him that he did not want his client interviewed and also that Mr. Wool was completely unaware of the fact, as was Mr. Falcone, that the remarks Falcone was uttering to assist his lawyer in answering questions posed by Mr. Axton,

would in fact be used against Mr. Falcone at a later date.

In MESAROSH v. UNITED STATES, 352 U.S. 1, 9, 14, the Supreme Court reminded prosecutors that the federal courts have supervisory powers over the conduct of criminal trials. Thus the Supreme Court declared:

> "This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity."

Similarly, at an earlier time, in McNABB v. UNITED STATES, 318 U.S. 332, the Supreme Court likewise declared:

> "We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted

> upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies Congressional legislation. The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."

In COOPEDGE v. UNITED STATES, 369 U.S. 438, the Supreme Court aptly proclaimed and cautioned (id. at 449):

> "When society acts to deprive one of its members of life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged." (Emphasis ours.)

POINT IV

THE COURT ERRED IN ADMITTING DOCUMENTS WHICH PETITIONERS WERE REQUIRED TO FILE WITH THE BANKRUPTCY COURT, AND ALSO ERRED IN ALLOWING THE F.B.I. AGENTS, ESPECIALLY MR. AXTON, TO TESTIFY TO STATEMENTS MADE BY DEFENDANTS AT A TIME WHEN THEY WERE UNAWARE THAT WHAT THEY SAID WOULD BE USED AGAINST THEM IN A CRIMINAL PROSECUTION. THIS VIOLATED 11 U.S.C. §25(a)(10).

At the commencement of the trial, the Bankruptcy Referee (Judge Marro) appeared before the Court below and his testimony was taken by stipulation. He indicated that the defendants were supposed to appear and therefore the documents and other statements which found their way into the bankruptcy records were there pursuant to statute. (7-10) An objection was preserved and such cases as MARCHETTI v. UNITED STATES and GROSSO

v. UNITED STATES, 390 U.S. 39, were cited to the Court on the grounds that the matters presented to the Bankruptcy Court are compulsory and not discretionary with people dealing with that Court. (9)

Substantial objections were made to the evidence of Agents Kallstrom, Playford, and Axton. (See Minutes of Hearing on Motions to Suppress, dated February 4, 1976, and the testimony of the aforesaid individuals which has been adverted to in this brief.)

See UNITED STATES v. GOODWIN, 470 F.2d 893, 903 (5 Cir. 1972); see also, UNITED STATES v. BLUE, 384 U.S. 251.

We therefore maintain that it was fundamentally unfair to have permitted this evidence to be introduced against the appellants herein. See COPPEDGE v.

UNITED STATES, supra; MESAROSH v. UNITED STATES, supra; and McNABB v. UNITED STATES, supra.

In essence, these agents were beguiling the defendants and, in fact, Agent Axton misrepresented in essence, to the attorney Joseph Wool, concerning whether or not the statements of Mr. Falcone would be used. This smacks of the same kind of deception that was condemned in SPANO v. NEW YORK, 360 U.S. 315.

POINT V

THE RESPONDENT WAS IN ESSENCE GRANTED TWO SEPARATE SUMMATIONS SINCE ASSISTANT UNITED STATES ATTORNEY O'NEILL SUMMED UP FOR THE PROSECUTION AND FOLLOWING THE DEFENSE SUMMATION, UNITED STATES ATTORNEY COOK GAVE WHAT AMOUNTED TO ANOTHER FULL SUMMATION. THERE WERE REMARKS MADE IN SUMMATION

WHICH WERE PREJUDICIAL, ESPECIALLY ON THE PART OF MR. COOK WHO INDICATED HIS OWN PERSONAL FEELINGS ABOUT THE EVIDENCE AND THE RESULT THE JURY SHOULD REACH.

The Court itself, after motions were made by the defense, stated that it felt that this case presented a "close question". (535)

Mr. O'Neill made improper remarks concerning the fact that this case had nothing to do with attorneys or C.P.A.'s. Of course, since advice of these professionals would be a defense if believed by the jury, that was obviously improper. (894)

Again, Mr. O'Neill adverted to the fact that attorney Wool's lips were sealed by the attorney-client privilege. (896) This, too, was prejudicial, since

when attorney Wool took the stand, the attorney-client privilege was obviously waived.

There were also improper remarks as to the fact that the defense had not called certain witnesses. (906)

In addition, the prosecutor declared that one Ferro, who was not even called as a witness, was a close associate of the defendant. (906) There was no basis for this since it never appeared in evidence. The prosecutor further declared that inferences could be used as evidence and when an objection was interposed that circumstantial evidence could be used but not merely inferences, the Court did not even admonish the jury. (909)

Moreover, there was a comment by

the prosecutor that Falcone had not produced warehousemen to substantiate the bad cheese. First of all, this was an improper remark. (914) Additionally, there was no burden upon the defendant to prove or disprove anything. Moreover, evidence had been introduced from the defendant, Curreri, two bookkeepers, a customer, Compagna, all of whom testified as to the rancid and odoriferous condition of the cheese in 1971. (914)

The Court would not instruct the jury to disregard the remarks. (915, 916)

Since even the Court realized that this was a close case, it was extremely important that the counsel be completely fair in presentation of a summation. Yet time and again the Unites States

Attorney himself, who allegedly presented the rebuttal, but who in effect summed up a second time, constantly used the first person "we think" and phrases such as that. For example, on page 965 the United States Attorney said, inter alia:

> "...we think under the circumstances, that they just cannot be believed."

The United States Attorney brought up matters not even mentioned by the defense in its summation. (975, wherein the U.S. Attorney referred to Mr. Sheltra, whom defense counsel had not even mentioned.)

At 976, the United States Attorney stated what he personally believed, saying ". . . I believe, Mr. Falivene who said he was close with the defendants."

At 981, the United States Attorney, without any basis whatsoever in the record, inferred prejudicial inferences against the petitioners, indicating that they had acted wholly improperly, without any evidence whatsoever of that fact. Even the Court was constrained to say that he was unaware of any evidence with respect to this matter. The United States Attorney, however, stood upon his argument and the prejudice was not in any way alleviated.

It is elementary that it is improper of counsel to give his own opinion as to the issues which a jury must resolve. (LAWN v. UNITED STATES, 355 U.S. 339, reh. den. 355 U.S. 967; 50 A.L.R.2d 766; 81 A.L.R.2d 1240).

POINT VI

THE DEFENSE HAD MOVED TO DISMISS THE INDICTMENT ON THE GROUNDS THAT NO CRIME WAS ESTABLISHED. MOREOVER, THE INDICTMENT ITSELF WAS TOO VAGUE TO ADEQUATELY APPRISE THE DEFENDANTS OF THE CHARGES AGAINST THEM. FINALLY, THE PROSECUTION WAS PERMITTED TO INTRODUCE EVIDENCE OUTSIDE THE SCOPE OF THE CONSPIRACY WHICH BEGAN ALLEGEDLY IN DECEMBER OF 1973, BUT THE PROOF CONCERNED ALMOST EXCLUSIVELY THE YEAR 1971.

Under this indictment, which is framed under 18 U.S.C. §152, it is essential that the Government prove that the defendants acted in contemplation of a bankruptcy. The indictment begins the conspiratorial action on or about December 13, 1973, up to and including the date of the indictment. Yet a substantial portion of the evidence introduced referred to the year 1971, which

was well before any possible bankruptcy could have been contemplated by anybody. The bankruptcy, as we have already said, was precipitated by a non-incendiary fire which destroyed the Alburg Creamery in July of 1973. It is inconceivable, therefore, that the acts alleged in 1971 could have been in contemplation of that involuntary bankruptcy.

Defense counsel had moved to dismiss the indictment on the grounds that it was too vague and did not adequately apprise the defendants of the charges against them. Certainly, nothing was said about bad cheese in 1971 in this entire indictment. The grand jury, presumably, was not told about it either. The bill of particulars which was supplied by the Government did not

specify that the theory of the prosecution was bad cheese in 1971, which the prosecution urged was not really that bad.

It is elementary that an indictment standing alone must contain at least the following elements:

> "The indictment standing alone must contain the following elements to constitute the offense charged:
>
> (a) Time and place must be alleged.
>
> (b) Knowingly and fraudulently must be alleged.
>
> (c) A description of the property concealed must be alleged.
>
> (d) The names or identification of the parties from whom concealed must be alleged.
>
> (e) That the property was part of the bankrupt estate must be alleged."

> (2 Collier on Bankruptcy para. 29.05, p. 1175, 1176-1179 [14th ed. 1969].)

See UNITED STATES v. ARGE, 10 Cir. 1969, 418 F.2d 721, 724. See also, CLAY v. UNITED STATES, 326 F.2d 196, 198 (10 Cir. 1963).

It is obvious that the prosecution shifted theories during the trial. When it realized that everything had in fact been disclosed, including the $210,000 entry which they were so concerned about, the prosecution sought to dwell upon a 1971 series of transactions wherein credits were given by Falcone Dairies to its own customers for defective cheese. This was no part of the indictment and was not within the purview of the conspiracy. Yet the Court permitted substantial evidence along this line and

the jury unquestionably found not that there had been any failure to disclose or concealment, but rather that there was some question as to whether or not the cheese was good or bad in 1971 and whether the reputation of the cheese-maker, Mr. Laramee, was to be vindicated.

The Supreme Court of the United States, when addressing itself to the issue of shifting theories and changing the thrust of an indictment from that which the grand jury found, has held throughout the years that an indictment must allege all of the essential elements of a crime in order to be sufficient. (UNITED STATES v. DEBROW, 346 U.S. 374, 376; MORISETTE v. UNITED STATES, 342 U.S. 246 at 270; EX PARTE BAIN, 121 U.S.

1, 10; STIRONE v. UNITED STATES, 361 U.S. 212; and, UNITED STATES v. DENMON, 483 F.2d 1093 (8 Cir. 1973). There are a host of other cases as well which are pertinent.)

We must bear in mind that a bill of particulars cannot be used for the purpose of amending an indictment. (RUSSELL v. UNITED STATES, 369 U.S. 749.) The bill of particulars did not advise appellants of the fact that the case would go to the jury on the contention of undisclosed underwriters.

In GAITHER v. UNITED STATES, 413 F.2d 1061 (D.C. Cir. 1969), the Court explained id. at 1067:

> "The Supreme Court has continued to adhere to the Bain principle in recent years. In Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270 (1960),

the grand jury charged a violation of the Hobbs Act. It found that the interstate commerce affected was the victim's shipment of sand from various other states to his plant in Pennsylvania. The trial judge allowed the Government to introduce evidence of interstate commerce other than that charged -- i.e., the movement of finished steel from the victim's plant outward to other states. The Court set aside the conviction, holding that the proof at trial of these uncharged facts amounted to an amendment of the indictment with respect to the element of interstate commerce. The Court relied on Bain, and quoted extensively from the passage set out above.

"In Russell v. United States, 369 U.S. 749, 82 S. Ct. 1038 (1962), the Supreme Court held that a bill of particulars cannot cure a fatally imprecise indictment. The bill of particulars fully serves the functions of apprising the accused of the charges and protecting him against future jeopardy, but it does not preserve his right to be tried on a charge found by a grand jury. The Court

again cited the passage from Bain, referred to 'the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form', and stated:

> '... To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.' ..."

In UNITED STATES v. DENMON, supra, the Court noted that the failure of an indictment to charge any essential element of the crime as submitted to the petit jury was fatally defective.

Thus, at 483 F.2d at pages 1095, 1096, the Court explained:

"The Supreme Court when addressing itself to this issue has throughout the years held that an indictment must allege all of the essential elements of a crime in order to be sufficient. United States v. Debrow, 346 U.S. 374, 74 S.Ct. 113, 98 L.Ed. 92 (1953); Morisette v. United States, supra at 270, 72 S.Ct. at 253, n. 30; Hagner v. United States, 285 U.S. 427, 431, 52 S.Ct. 417, 76 L.Ed. 861 (1932); United States v. Carll, 105 U.S. 611, 612, 26 L.Ed. 1135 (1881). The Government here, however, would remedy the defect of not alleging criminal intent or mens rea by applying the following 'fairness test' enunciated by Professor Wright:

"The fundamental purpose of the pleadings is to inform the defendant of the charge so that he may prepare for his defense, and the test of sufficiency ought to be whether it is fair to the defendant to require him to defend on the basis of the charge as stated in the particular indictment or information. The state requirement that every ingredient or essential element of the offense should be alleged must be read in the light of the fairness test just

suggested. C. Wright, Federal Practice and Procedure, §125, at 233-34 (1969) (footnotes omitted).

"In applying the 'fairness test,' the Government points out that the District Court properly instructed the jury on specific intent and defined 'knowingly' and 'wilfully.' So it did and it is probable that the defendant was not mislead as to the crime charged, but we think the omission of an admittedly essential element of the offense in the indictment is a matter of substance and not form. Nor can the missing element here be properly implied or inferred from other elements and allegations of the indictment.

"We heartily applaud the salutory trend in recent years to simplify the indictment as embraced in Fed.R.Crim.P. 7(c) that only requires that '[t]he indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charge.' Yet we cannot go so far in economy of words as to approve the omission in an indictment of essential

elements of an offense."

Due process of law, the Supreme Court has observed, "requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept ... What is fair in one set of circumstances may be an act of tyranny in others." (SNYDER v. MASSACHUSETTS, 291 U.S. 97, 116, 117.)

Conversely, "as applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." (LISENBA v. CALIFORNIA, 314 U.S. 219, 236.)

Basic to the very idea of free government and among the immutable principles of justice which no prosecutorial authority may deny or

disregard is the necessity of due "notice of the charge and an adequate opportunity to be heard in defense of it." (POWELL v. ALABAMA, 287 U.S. 45, 68.)

Thus, where a trial proceeds on one theory, and the Court and prosecutor suddenly send the case to the jury on a theory that was not charged in the indictment and was not the subject of the evidence at the trial proper, the conviction is as much a violation of due process as a conviction upon a charge never made. (COLE v. ARKANSAS, 333 U.S. 196, 202, and WILLIAMS v. NORTH CAROLINA, 317 U.S. 287, 292.)

In WILLIAMS, supra, the Supreme Court explained that where a jury verdict of guilty is based upon a general verdict that does not specify on which

ground it rests, and one of the grounds upon which it may rest is invalid, the judgment cannot be sustained.

Similarly, a conviction based upon a dearth of evidence (e.g., undisclosed underwriters) cannot stand. (THOMPSON v. LOUISVILLE, 362 U.S. 199; and GARNER v. LOUISIANA, 368 U.S. 157.)

A person can be tried only upon the indictment as found by the grand jury, and especially upon the language found in the charging part of the instrument. (STIRONE v. UNITED STATES, 361 U.S. 212, supra, wherein a variation between pleading and proof was held to deprive petitioner of his right to be tried only upon the charges presented in the indictment.)

A change in the indictment which

is not made by the grand jury deprives the Court of the power to try the accused. (EX PARTE BAIN, 121 U.S. 1, 12.)

See also, UNITED STATES v. CURTIS, (19 Cir. 12/4/74), 506 F.2d 985, 16 CrL 2285, holding that an indictment not specifying the charge submitted, is insufficient to uphold a conviction, despite sufficiency of evidence.

> "For all the indictment shows the grand jury may have had a concept of the scheme essentially different from that relied upon by the government ... Instructions cannot save a bad indictment ..." (UNITED STATES v. CURTIS, supra, id. at 16 CrL 2286, 506 F.2d at 992.)

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

IRVING ANOLIK and
JAMES W. MURDOCK,
Attorneys for
Defendants-Appellants.

IRVING ANOLIK
Of Counsel

1A

OPINION OF CIRCUIT COURT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 277—September Term, 1976.

(Argued October 5, 1976 Decided November 1, 1976.)

Docket No. 76-1237

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH FALCONE and JOSEPH CURRERI,

Appellants.

Before:

LUMBARD, FEINBERG and MESKILL,

Circuit Judges.

Appeal from convictions entered in the United States District Court for the District of Vermont, Albert W. Coffrin, *Judge,* for the fraudulent transfer and concealment of the property of a bankrupt, the making of a false oath in regard to a bankruptcy proceeding, the making of a false entry in a document relating to the property of a bankrupt, and conspiracy to violate the bankruptcy laws.

Affirmed.

GEORGE W. F. COOK, United States Attorney for the District of Vermont (Jerome F. O'Neill, Assistant United States Attorney, on the brief), *for Appellee.*

IRVING ANOLIK, Esq., New York, N.Y. (James W. Murdoch, Esq., Burlington, Vermont, on the brief), *for Appellants.*

LUMBARD, *Circuit Judge:*

Joseph Falcone and Joseph Curreri appeal from convictions entered on April 19, 1975 after an eight day trial before Judge Coffrin in the District of Vermont. Appellants were each found guilty, on five counts, of having violated 18 USC §§ 152 and 2:[1] the fraudulent concealment of the property of a bankrupt from the trustee and creditors of Alburg Creamery, Inc. of Alburg, Vermont (count I); the making of a false oath in regard to a bankruptcy proceeding (count II); the fraudulent transfer and concealment of property in contemplation of a bankruptcy proceeding and with the intent to defeat the bankruptcy laws (count III) the fraudulent making of a false entry

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1 The relevant portions of 18 USC § 152 provide as follows:

> Whoever knowingly and fraudently conceals from the receiver, custodian, trustee, marshal or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or
>
> Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; or
>
> • • •
>
> Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against him or any other person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation; or
>
> Whoever, after the filing of a bankruptcy proceeding or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt;
>
> • • •
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

in a document relating to the property of a bankrupt (count IV); and, conspiring to violate the bankruptcy laws by the doing of the foregoing acts (count V).[2] The principal claim of appellants is that there was insufficient evidence to submit the case to the jury and that the trial court erred in denying their motion for judgment of acquittal. We find no merit in any of the claims of error and, accordingly, affirm.

During the period of the alleged offenses, appellant Falcone was an officer of both Falcone Dairy Products, Inc., of Brooklyn, New York (hereinafter "the Dairy") and its wholly owned subsidiary Alburg Creamery (hereinafter "Alburg"); Curreri was the office manager of the Dairy during this time period. Alburg's principal product was mozzarella cheese, most of which was ordinarily sold to the Dairy which marketed the cheese to its customers.

The essence of the government's case was that by placing a false credit of $210,711.05 on the Dairy's books against amounts owed to Alburg, the appellants transferred and concealed Alburg's accounts receivable in contemplation of Alburg's bankruptcy. According to the government, this offense was compounded by the filing with the trustee in bankruptcy of a false Statement of Affairs which failed to disclose that the credit had been taken, and which, as a result of the credit, listed the Dairy as a creditor rather than a debtor of Alburg.

The main factual issue at trial revolved around appellants' claim that the credit, which had been entered on the books on January 31, 1974, was legitimately taken for de-

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2 Both Falcone and Curreri were charged with committing the acts alleged in counts I and IV. Counts II and III charged that Falcone committed the relevant acts, aided and abetted by Curreri. See 18 USC § 2. Falcone was sentenced to 3 years imprisonment and a $2,000. fine on each count, the sentences to run concurrently. Curreri received 3 years imprisonment and a $500. fine on each count, the sentences to run concurrently.

fective, "fishy"-smelling cheese delivered by Alburg in 1971. The government produced substantial evidence in support of its theory that the credit was fraudulently taken and that the "fishy" cheese story was a fabrication to cover-up the transfer and concealment of Alburg's assets. The government established that on January 22, 1974 Alburg was adjudicated a bankrupt and on that date the Dairy owed Alburg somewhere between $172,000. and $284,000. for shipments of cheese; the exact amount owed was uncertain as most of Alburg's books were lost in a fire that destroyed the Alburg plant on July 13, 1973. On January 31, 1974, pursuant to the instructions of the appellants, a credit against Alburg in the amount of $210,711.05 was placed in the Dairy's books with the notation: "Accounts Payable—Alburg. . . . To adjust for credits to customers due to defective cheese from July 1971 thru Dec. 1971."[3] The government further established that as vice-president of Alburg, Falcone executed a Statement of Affairs and filed it with the trustee in bankruptcy on February 14, 1974. The Statement did not show the Dairy to be a debtor of Alburg; rather, the statement listed the Dairy as an unsecured creditor of Alburg in the amount of $48,709.31.[4] The statement failed to indicate in any way that the Dairy had taken the $210,000. credit just a few days before. The trustee testified that although the Dairy's books had been produced (at his request), the estate was administered on the basis of the debits and credits shown in the Statement of Affairs. Thus, the trustee did not attempt to collect and did not even know of the debt owed by the Dairy.

3 Government's Exhibit 72, Government's Appendix at 9.

4 The trustee testified at trial that although the Dairy at first indicated that it would make a claim against the estate. it later withdrew. Thus, it appears that the Dairy did not participate in the distribution of Alburg's assets.

In support of the government's contention that little or no defective cheese was delivered by Alburg in 1971 Leo Laramee, a cheesemaker and the manager of Alburg up until his resignation in 1973, testified that although Alburg had some problems with "fishy"-smelling cheese up until 1969, this problem was eliminated in 1969.[5] Laramee was unaware of any substantial or unusual problems with Alburg's cheese in 1971; he received no complaints from the Dairy, and, in fact, the Falcones had complimented him on the quality of Alburg's cheese. Warren Laramee (Leo Laramee's son, employed as a cheesemaker at Alburg), substantially corroborated his father's testimony.

According to the government's calculations at trial, in order to establish a $210,000. credit, the Dairy must have received more than 400,000 pounds of rancid cheese—about 40 per cent of all cheese delivered by Alburg to the Dairy in the last six months of 1971. The government established that Lucille Farm Products, Inc., which bought one-half of Alburg's cheese output in 1971 (about one million dollars worth), received only $1,900. in credits against Alburg for that entire year.

As indicated above, the defense at trial was that the $210,000. credit was legitimately taken for defective cheese that Alburg delivered to the Dairy in the last six months of 1971. Both appellants testified that the Dairy had received large amounts of rancid cheese from Alburg during the period in question and that because of this the Dairy had been forced to give numerous credits to its customers. While the Dairy's books showed that during the last six months of 1971 a number of credits had been given to cus-

5 Laramee testified that up until 1969 Alburg used village water in its cheese production and that this water sometimes contained weeds and little fish or polliwogs—which would account for the "fishy" odor of defective cheese. This problem was cleared up in 1969, when Alburg dug its own well.

tomers, the entries neither specified the reason the credits were given, nor indicated in any way that the Dairy had received bad cheese from Alburg. Appellants also testified that they had not taken the credits against Alburg in 1971 because they were afraid that to do so would have thrown Alburg into bankruptcy. The appellants also called Joseph Campagna, a Dairy customer, who testified that he had received a good deal of foul cheese from the Dairy for which he received credit. However, Campagna's testimony was indefinite as to the amount of cheese and credits involved and he stated that he did not know who had produced the cheese; this latter admission is significant because the government established that Alburg was not the Dairy's only source of cheese.

Appellants also called their attorney, Joseph Wool, and the Dairy's accountant who testified that they had advised the appellants that it would be permissible to take a credit in 1974 for deliveries of foul cheese made in 1971. In addition, appellants produced an accounting expert who testified that, in his opinion, it was not an improper accounting method to cancel the 1971 purchases in 1974. Of course, if the jury believed that there was no factual basis for the credit, the advice given the appellants was wholly immaterial.[6]

Viewing the evidence in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80

6 Appellants' claim that there could have been no criminal intent because of their reliance upon expert advice (i.e., their lawyer and accountant) amounts to no more than another attempt to challenge the sufficiency of the evidence. Appellants do not question the correctness of the court's jury instruction that appellants' reliance upon expert advice should be considered a circumstance disproving fraudulent intent only if the jury found that the advice was given after full disclosure of all relevant and material facts. See *Williamson* v. *United States*, 207 U.S. 425, 453 (1908); *Bisno* v. *United States*, 299 F.2d 711, 719 (9th Cir. 1961), cert. denied, 370 U.S. 952 (1962); *United States* v. *McCormick*, 67 F.2d 867, 870 (2d Cir. 1933).

(1942); *United States* v. *Marrapese*, 486 F.2d 918, 921 (2d Cir, 1973), cert. denied, 415 U.S. 994 (1974), it is clear that a reasonable juror might fairly find the appellants guilty. *United States* v. *Rivera*, 513 F.2d 519, 528-30 (2d Cir.), cert. denied, 96 S.Ct. 367 (1975); *United States* v. *Freeman*, 498 F.2d 569, 571 (2d Cir. 1974); *United States* v. *Taylor*, 464 F.2d 240, 243-45 (2d Cir. 1972). There was ample evidence that the $210,000. credit was entered with the intent to transfer and conceal Alburg's accounts receivable and that the "fishy"-cheese story was a fabrication. That the Dairy waited over two years, until its subsidiary had gone bankrupt, before taking the credit is in itself suspicious. Moreover, the Dairy's books nowhere indicate (except, of course in the January 31, 1974 entry taking the credit) that any bad cheese had been received from Alburg during the relevant period. To justify the $210,000. credit, 40 per cent of the cheese sent by Alburg to the Dairy in the last six months of 1971 would have had to have been bad. In contrast, Lucille Farm Products, Inc., which in 1971 bought one-half of Alburg's output, received only $1,900. in credits for the entire year. Finally, Alburg's manager, Leo Laramee, testified that he received no complaints from the Dairy in 1971 concerning "fishy" cheese and was unaware of any unusual problems with Alburg's cheese.

The remaining claims of error merit little discussion. Appellants allege that FBI agents used tactics that were "fundamentally unfair" in obtaining statements admitted over objection at trial. Agent Axton indicated to Falcone's attorney, Joseph Wool, that he was conducting a criminal investigation into entries in the Dairy's books and wished to interview Falcone. Wool stated that he did not want Falcone interviewed; nonetheless, at a meeting among Axton, Wool and Falcone, Falcone volunteered answers to questions that Axton directed to Wool. Axton testified to these statements at trial. The court found the statements

to be voluntarily given. We reject as frivolous appellants' claim that it was fundamentally unfair for Axton to testify to Falcone's statements without having first informed Falone and his attorney that Falcone's statements might later be repeated at trial.

Appellants also claim that bankruptcy documents, which were required by law to be filed, were admitted at trial in violation of their Fifth Amendment privilege against self-incrimination.[7] Appellants' reliance on *Marchetti* v. *United States*, 390 U.S. 39 (1968) and *Grosso* v. *United States*, 390 U.S. 62 (1968) is entirely misplaced. These cases involved reporting requirements aimed at a highly select group, inherently suspect of criminal activities; further, the inquiries were directed in an area permeated with criminal statutes. See *California* v. *Byers*, 402 U.S. 424, 427-31 (1971) (plurality opinion). In contrast, requirements of the type at issue here have an important regulatory aim and are of general applicability, as the Supreme Court held in *Johnson* v. *United States*, 228 U.S. 457, 458-59 (1913):

> It is true that the transfer of books may have been against the defendant's will, but it is compelled by the law as a necessary incident to the distribution of his property, not in order to obtain criminal evidence against him. Of course a man cannot protect his property from being used to pay his debts by attaching to it a disclosure of crime. If the documentary confession comes to a third hand alio intuitu, as this

7 Appellants do not specify what documents they find objectionable but apparently they were the Statement of Affairs and the involuntary petition in bankruptcy. Appellants also object to the admission of a memorandum of the bankruptcy judge referring to a proceeding in which Falcone testified. The memorandum was offered only to show that Falcone appeared at the proceeding and it did not contain his testimony. See Record, vol. 1, at 9. Consequently 11 U.S.C. § 25(a)(10) has no application. In any event appellants fail to explain, and we fail to discern, what prejudice they suffered from the memorandum's admission.

> did, the use of it in court does not compel the defendant to be a witness against himself.

Although *Johnson* predated *Marchetti* and *Grosso*, its holding here is in line with more recent Supreme Court cases. See *California* v. *Byers*, *supra*, 402 U.S. at 427-31; see also *Bisno* v. *United States*, 299 F.2d 711, 718-19 (9th Cir. 1961), cert. denied, 370 U.S. 952 (1962).[8]

Lastly, with respect to the appellants' claims regarding the insufficiency of the indictment, it is enough to say that the superseding indictment upon which appellants were tried set forth the elements of the offense charged and provided appellants with ample detail to assure against double jeopardy and to appraise them of what they would have to be prepared to meet. See *United States* v. *Tramunti*, 513 F.2d 1087, 1113 (2d Cir.), cert. denied, 96 S.Ct. 54 (1975); *United States* v. *Salazar*, 485 F.2d 1272, 1277 (2d Cir. 1973), cert. denied, 415 U.S. 985 (1974).

Convictions affirmed.

8 We reject as against common sense and precedent appellants' unsupported suggestion that 11 U.S.C. § 25(a)(10) should be interpreted to require exclusion of the Statement of Affairs, the involuntary petition in bankruptcy and the statements made to F.B.I. agents. See *Ensign* v. *Pennsylvania*, 227 U.S. 592, 598-99 (1913); *In re U.S. Hoffman Can Corp.*, 373 F.2d 622, 625 (3rd Cir. 1967).

ORDER OF AFFIRMANCE

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the first day of November, one thousand nine hundred and seventy-six.

PRESENT: HON. J. EDWARD LUMBARD,

HON. WILFRED FEINBERG,

HON. THOMAS J. MESKILL, CJ

Circuit Judges.

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UNITED STATES OF AMERICA, :

Plaintiff-Appellee, :

-against- :

JOSEPH FALCONE and JOSEPH CURRERI, :

Defendants-Appellants. :

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Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

VINCENT A. CARLIN,
Chief Deputy Clerk

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the thirtieth day of December, one thousand nine hundred and seventy-six.

PRESENT: HON. J. EDWARD LUMBARD,

HON. WILFRED FEINBERG,

HON. THOMAS J. MESKILL, CJ

Circuit Judges.

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH FALCONE and JOSEPH CURRERI,

Defendants-Appellants.

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A petition for a rehearing having been filed herein by counsel for the appellants.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk